The *Shell* judgment – a bombShell in private international law?

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Abstract

This article discusses the recent judgment of the District Court of The Hague in Milieudefensie et al. v. RDS *(May 26, 2021, ECLI:NL:RBDHA:2021:5337). It reviews the most important substantive rulings of the Court and then focusses on the private international law aspects of the case. Milieudefensie et al. argued that the adoption of the concern policy for the Shell Group by RDS qualifies as the* Handlungsort *and that Dutch law is therefore applicable to their claims based on Article 7 Rome II Regulation. RDS disagreed with this line of reasoning for multiple reasons. Since there is (as yet) no legal precedent regarding this discussion, both Milieudefensie and RDS relied on the analogous application of case law that concerned the interpretation of the Handlungsort under the Brussels Ibis Regulation. The legal debate between the parties regarding this aspect and the conclusion of the Court are set out in this article. The authors conclude with an analysis of the assessment of the Court and suggest that, given the impact of this ruling and the fact that there is no legal precedent, the Court* ex officio *should have requested a preliminary ruling from the Court of Justice.*

1. Introduction

'The Stone Age did not end for lack of stone, and the Oil Age will end long before oil runs out.'[1] These words were presumably first spoken by Ahmed Zaki Yamani, the former Minister of Oil for Saudi Arabia. Indeed, as developments over the past few years have shown, the end of the Oil Age is slowly but surely drawing closer. Oil giants all over the world are under significant pressure to become more sustainable and to wean themselves off fossil fuels – by legislation, investors, activists and now also the judiciary. Shell, already seemingly eager to push the sustainability agenda, received shareholder approval in May 2021 for its plan to be a fully climate-neutral company by 2050, which includes end-user emissions.[2] While this is very ambitious by industry standards,[3] it was not enough in the eyes of the District Court of The Hague (hereinafter: the Court). On May 26, 2021, the Court issued a ruling, ECLI:NL:RBDHA:2021:5337,[4] ordering that the parent company of the Shell group (hereinafter: Shell), Royal Dutch Shell PLC (hereinafter: RDS), must ensure, through policy changes, that Shell,

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1 'Ahmed Zaki Yamani, former Saudi oil minister, dies aged 90', www.ft.com.

2 R. Bousso, 'Shell shareholders increase pressure for further climate action', 18 May 2021, www.reuters.com.

3 'Exxonmobile loses a proxy fight with green investors', 29 May 2021, www.economist.com.

4 District Court of The Hague 26 May 2021, ECLI:NL:RBDHA:2021:5337, *NIPR* 2021, 389. The official English translation can be found under District Court of The Hague 26 May 2021, ECLI:NL:RBDHA:2021:5339.

its suppliers and customers reduce the aggregate annual volume of all CO_2 emissions into the atmosphere by at least 45% net by the end of 2030 relative to 2019 levels (the *Shell* judgment).[5]

The *Shell* judgment follows a 2019 ruling by the Supreme Court of the Netherlands (Supreme Court) in the *Urgenda* case.[6] In *Urgenda*, the Supreme Court upheld The Hague Appeal Court's ruling ordering the Dutch State on the basis of Articles 2 (the right to life) and 8 (the right to respect for private and family life) of the European Convention on Human Rights (ECHR) to reduce, by the end of 2020, greenhouse gas emissions by at least 25% compared to 1990 levels. Urgenda recently announced that it is going to commence proceedings against the Dutch State in which it seeks penalty payments for the State's non-compliance with this judgment.[7] Furthermore, immediately following the *Shell* judgment, Milieudefensie,[8] the main claimant, announced that it would consider taking non-litigious action or commencing similar proceedings against other large-scale CO_2 emitters based in the Netherlands.[9] Indeed, the organization has publicly announced that it is considering approaching the ten largest CO_2 polluters in the Netherlands. These include companies such as Tata Steel, Chemelot, electricity producers such as Engie, RWE, Eneco and Vattenfall, DOW Benelux, the fertilizer producer Yara, the BP refinery in Rotterdam, and Air Liquide. Milieudefensie has asked these entities to take action with reference to the *Shell* judgment, with an implicit threat that failing to do so could prompt it to bring litigation similar to that against Shell.[10] The organization is also believed to have shared translations of all the Shell court documents with sister organizations. Even though Milieudefensie has invited Ben van Beurden, the CEO of Shell, to join the conversation on how to prevent an appeal against the *Shell* judgment,[11] Shell has announced that it will appeal the *Shell* judgment.[12] Shell agrees that urgent action is needed and that it will accelerate its transition to net zero; however, it believes that a court judgment against a single company is not effective. In its press release, Shell backs clear, ambitious policies that will drive fundamental change across the whole energy system. In addition to the *Shell* judgment, other similar organizations are becoming involved. In France, Notre Affaire à Tous has already started similar proceedings against the oil company Total.[13]

Besides the ground-breaking substantive outcome of the *Shell* judgment as mentioned above, the *Shell* judgment contains a couple of considerations that are worth mentioning, which con-

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5 District Court of The Hague 26 May 2021, ECLI:NL:RBDHA:2021:5339, para. 4.6.1.

6 Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*).

7 E. van der Walle, 'Urgenda weigert "genaaid" te worden en voert bij kabinet druk op' [Urgenda refuses to be 'screwed' and increases pressure on the cabinet], 28 June 2021, www.nrc.nl.

8 Friends of the Earth Netherlands.

9 T. Voermans, 'Reeks van zaken tegen CO2-vervuilers in de maak' [A series of proceedings against CO_2 emitters is on its way], 28 May 2021, www.parool.nl.

10 '6 consequenties van de uitspraak in de klimaatzaak' [6 consequences of the judgment in the climate change case], 31 May 2021, www.milieudefensie.nl.

11 'Milieudefensie wil in gesprek met Shell om hoger beroep te voorkomen' [Friends of the Earth Netherlands invites Shell to join the conversation on how to prevent an appeal], 24 June 2021, www.milieudefensie.nl.

12 'Shell confrims decision to appeal court ruling in the Netherlands climate case', 20 July 2021, www.shell.com.

13 Complaint in *Notre Affaire à Tous and Others v. Total* (January 28, 2020), available at http://climatecasechart.com/climate-change-litigation/non-us-case/notre-affaire-a-tous-and-others-v-total/ (accessed 16 August 2021).

cern the determination of the applicable law on environmental damages claims. In this article, we will provide a brief overview of the substantive ruling of the *Shell* judgment (section 2) and the legal debate between the parties (section 3). This will be followed by the determination of the applicable law by the Court (section 4). In section 5 we will assess the considerations of the Court. We will conclude with some observations on the consequences of the *Shell* judgment.

2. The substantive ruling of the *Shell* judgment

The proceedings against RDS were brought by Milieudefensie together with other organizations, and by more than 17,000 individuals (for reasons of simplicity, we will refer to all the parties together as 'Milieudefensie'). Their goal was to 'prevent Shell from continuing to pollute and causing dangerous climate change'.[14] Milieudefensie claimed that the activities of RDS constitute an unlawful act towards them and that, for the interpretation of the open standard of care set out in the Dutch Civil Code's provision on tort liability, consideration should be given to, amongst others, human rights and soft law endorsed by RDS itself.[15]

The Court upheld Milieudefensie's argument and found that RDS has an individual responsibility regarding the significant CO_2 emissions over which it has control and influence. According to the Court, the reduction concerns the Shell group's entire energy portfolio and the aggregate volume of all emissions. The Court did, however, make a distinction between the CO_2 emissions by or controlled by the Shell group itself (RDS and the other Shell companies) and emissions merely caused by activities of the business relations of the Shell group, including the end-users. The obligation to reduce its CO_2 emissions by 45% by the end of 2030 has been imposed as an obligation of result for emissions by or controlled by the Shell group itself. The reduction of emissions by its customers or other business relations, however, has been set as a 'significant best-efforts obligation' for RDS to take the necessary steps to remove or prevent the serious risks ensuing from the CO_2 emissions generated by these third parties and to use its influence to limit any lasting consequences.[16]

The Court did not rule that RDS is already acting in violation of the applicable standard of care; however, such violation is imminent, as its current policies and policy intentions are not sufficiently clear, defined and binding for the long term. The Court further found that RDS' plans do not contain any reduction target for 2030, and that these plans are too dependent on the pace at which global society will move towards the climate goals of the Paris Agreement.

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14 'Alles wat je moet weten over de rechtszaak tegen Shell' [Everything you need to know about the proceedings against Shell], 20 May 2021, www.milieudefensie.nl.

15 District Court of The Hague 26 May 2021, ECLI:NL:RBDHA:2021:5339, para. 3.2.

16 District Court of The Hague 26 May 2021, ECLI:NL:RBDHA:2021:5339, para. 4.1.4. By using the exact words 'significant best-efforts obligation' the Court – probably unknowingly – caused confusion regarding the scope of this obligation. As Drion recently pointed out, a 'best-effort obligation' is the highest threshold of an 'effort obligation'. This entails that a party has to do everything in its power and may spare no costs to achieve the promised result, whereas 'reasonable efforts' limits the actions and the costs that a party has to perform and respectively incur to fulfil its obligations. Lawyers use all kinds of different versions of the 'effort obligation', but 'significant best-efforts' is not one that is seen in practice. We will have to wait and see whether the appeal will change this unfortunate choice of words on appeal. As discussed in C.E. Drion, 'Efforts Obligations', *NJB* 2021/22, p. 1789.

Before the Court arrived at its judgment, it had to consider jurisdiction and determine the applicable law for the claims of Milieudefensie. Since the jurisdiction of the Court was not in dispute between the parties, the Court did not explicitly determine its jurisdiction. RDS has its headquarters in The Hague, the Netherlands, and RDS included in its articles of association that the board has its principle place of business at its headquarters. We therefore presume that it assumed jurisdiction based on Article 4 Brussels I*bis* Regulation[17] in connection with Article 63(1)(b) Brussels I*bis* Regulation (*forum rei*) or Article 26 Brussels I*bis* Regulation (voluntary appearance of the defendant).

However, the parties were in dispute as to which law the Court should apply to the claims by Milieudefensie. The contentions dealt mainly with whether the adoption of the policy concerned for Shell by RDS could be deemed as the 'event giving rise to the damage' (the so-called '*Handlungsort*') in the sense of Article 7 Rome II Regulation.[18] Whilst Milieudefensie argued that this was the case and that therefore Dutch law was applicable, RDS was of the opinion that its adoption of the group policies concerned could not qualify as the *Handlungsort* with regard to the environmental damage that the claims of Milieudefensie dealt with. RDS argued that the *Handlungsort* lay in all the states where affiliates of RDS emitted CO_2. Accordingly, the Court had to apply the laws of all of these states before it could grant the requested injunction. Given the fact that there is no specific legal precedent from the Court of Justice of the European Union (CJEU) that deals with this question, both parties relied either on case law that concerned the interpretation of the *Handlungsort* with regard to different conflict rules under the Rome II Regulation, or on case law explaining the term 'event giving rise to the damage' in Article 7(b) of the Brussels I*bis* Regulation. The latter determines which court has jurisdiction over non-contractual claims.[19] In the following section, we will look at the legal contentions of the parties regarding the applicable law in greater detail.

3. The legal debate between the parties

3.1 Arguments by Milieudefensie

Milieudefensie stated that based on Article 7 and Article 4(1) up until (3) Rome II Regulation Dutch law would be applicable to its claims.[20] It argued that the adoption of the Shell group policy qualified as the *Handlungsort* based on the following arguments. First, RDS has its headquarters and daily management in The Hague. RDS exercises management control over the

17 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* 2012, L 351/1 (Brussels I*bis* Regulation).

18 Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, *OJ* 2007, L 199/40 (Rome II Regulation).

19 Such an interpretation, if the articles are similar, was allowed by the CJEU 23 October 2014, Case No. C-302/13, ELCI:EU:C:2014:2319, *NIPR* 2014, 379 (*flyLAL*), para. 25 and further references. The Supreme Court ruled accordingly in Supreme Court of the Netherlands 3 June 2016, ECLI:NL:HR:2016:1054, *NIPR* 2016, 278 (*Dahabshiil*).

20 Writ of Summons Milieudefensie, para. 98 (made public by Milieudefensie at: https://milieudefensie.nl/actueel/hier-vind-je-alle-juridische-documenten-van-onze-klimaatzaak-tegen-shell).

entire Shell Group[21] and determines its worldwide environmental policy.[22] Furthermore, RDS' executive board is in charge of the overall management of that policy and bears the ultimate accountability. According to Milieudefensie, the policy concerned would be climate-unfriendly and cause damage to the people of the Netherlands.[23]

Milieudefensie argued that the objective of Article 7 Rome II Regulation is to provide a high level of protection against environmental damage, and that the environmental damage as a priority should be mitigated at its source.[24] Given the fact that RDS' current and future group-wide policies constitute a significant threat of environmental damage being realized, and considering that it is only possible to take successful action against this environmental damage if those policies can be altered, adopting the policies should be seen as an event giving rise to the damage.

To support its argument, Milieudefensie *inter alia* relied on the judgment of the CJEU in the *Kolassa/Barclay Bank* case.[25] In that case, an Australian private investor held Barclays Bank liable for the provision of intentionally incorrect information in its prospectuses. In order to establish which court had jurisdiction regarding the claim, the parties asked the CJEU to determine what the *Handlungsort* was. The CJEU ruled that the *Handlungsort* was the place where the decision making for the investment modalities and content of the relevant prospectuses chosen by the bank had taken place. Milieudefensie furthermore referred to the *Pez Hejduk* case, in which the location where the board of a company decided to put photos on its website, which photos constituted copyright infringement, could be deemed the *Handlungsort* in deciding which court had jurisdiction.[26] Finally, Milieudefensie referred to the *Nintendo* case, which concerned various acts of infringement in various Member States.[27] The CJEU determined that, where the same defendant is accused of various acts of infringement, the correct approach for identifying the event giving rise to the damage is not to refer to each alleged act, but to make an overall assessment of that defendant's conduct in order to determine the place where the initial act of infringement was committed or was threatened to be committed. Milieudefensie stressed that all the case law it mentioned did not concern the interpretation of the event giving rise to damage in the context of Article 7 Rome II Regulation. In general, that case law concerned a jurisdictional matter and applied to situations where the high level of protection connected with Article 7 Rome II Regulation does not play a role in the interpretation of the term 'event giving rise to the damage'. According to Milieudefensie, every interpretation of this term in the context of international environmental damage must at all times take the background and objective of Article 7 Rome II Regulation into account, as well as respect and promote the favour

21 Notes on oral arguments 3, Milieudefensie, paras. 6-7.

22 Writ of Summons, para. 101.

23 Notes on oral arguments 3, Milieudefensie, para. 14.

24 As described in the Preamble to the Treaty on the Functioning of the European Union (TFEU), Art. 191, para. 2. Notes on oral arguments 3, Milieudefensie, para. 28.

25 CJEU 28 January 2015, Case No. C-375/13, ECLI:EU:C:2015:37, *NIPR* 2015, 50, *NJ* 2015/322 (*Kolassa/Barclay Bank)*, para. 53.

26 CJEU 22 January 2015, Case No. C-441/13, ECLI:EU:C:2015:28, *NIPR* 2015, 49 (*Pez Hejduk*), para. 25.

27 CJEU 27 September 2017, Case Nos. C-24/16 and C-25/16, ECLI:EU:C:2017:724, *NIPR* 2017, 463 (*Nintendo*).

principle that it encompasses.[28] Milieudefensie therefore contended that the Court should give a suitable and broad interpretation of the term 'event giving rise to the damage'.

Milieudefensie deemed the fact that RDS as a parent company within the Shell Group barely emits any CO_2 itself to be irrelevant.[29] In doing so, Milieudefensie pointed to the *Urgenda* case. As previously mentioned, the Supreme Court in *Urgenda* ordered the State of the Netherlands to change its policy, even though the State of the Netherlands itself only emits an extraordinarily small part of national Dutch emissions. The Supreme Court based its order on the ability of the Dutch State to control the total volume of the national emissions, which exceeded the permitted amount.[30] In addition, Milieudefensie argued that the only way to prevent actual CO_2 emissions – and therefore the environmental damage resulting therefrom – is to intervene at the policy level.[31]

Hence, Milieudefensie was of the opinion that the group policy of RDS can be seen as an event giving rise to the damage in the sense of Article 7 Rome II Regulation, and this meant that Milieudefensie could choose Dutch law as the applicable law to its claims.

Alternatively, if the group policy would not qualify as an event giving rise to the damage, Milieudefensie argued that the damage, in the form of climate change and all the resulting adverse (direct) effects on the environment and the people, also manifests itself in the Netherlands.[32] Furthermore, Milieudefensie argued that Dutch law ought to be applicable since (i) both Milieudefensie and RDS both have their habitual residence in the Netherlands; (ii) account needs to be taken of the Dutch rules on safety and conduct,[33] and (iii) given all the circumstances of the case, the tort has the manifestly closest connection to the Netherlands.[34] We note that with the use of the conflict rule laid down in Article 7 Rome II Regulation, the conflict rules of Article (4)(2) and Article (4)(3) Rome II Regulation are disregarded.[35] We will therefore not further elaborate on these articles.

3.2 Arguments by RDS

RDS argued that the adoption of its policy cannot be seen as the *Handlungsort* in the sense of Article 7 Rome II Regulation.[36]

According to RDS, the mere adoption of a policy does not cause damage and can therefore not qualify as the harmful event.[37] In *Pez Hejduk*, a case regarding the jurisdiction of the courts

28 Notes on oral arguments 3, Milieudefensie, para. 71.

29 Notes on oral arguments 3, Milieudefensie, para. 49.

30 Notes on oral arguments 3, Milieudefensie, para. 49. See Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*).

31 Notes on oral arguments 3, Milieudefensie, para. 56.

32 Writ of Summons, para. 102.

33 Art. 17 Rome II Regulation.

34 Writ of Summons, para. 103.

35 '*Erfolgsort*' unless a choice is made for '*Handlungsort*', Asser/Kramer & Verhagen 10-III 2015/1052.

36 Statement of defence RDS, paras. 303 up until 342 and Pleading notes: applicable law Part I and Part II (made public by Milieudefensie at: https://milieudefensie.nl/actueel/hier-vind-je-alle-juridische-documenten-van-onze-klimaatzaak-tegen-shell).

37 Statement of defence RDS, para. 305.

over an alleged tort that consisted of the infringement of a copyright, RDS concluded that the CJEU had ruled that the term 'harmful event' concerns the event in which the (alleged) damage originates.[38] Furthermore, RDS argued that the Supreme Court ruled in *BUS/Chemconserve* that a purely internal decision cannot qualify as the harmful event[39] and that therefore the adoption of the policy by RDS cannot be regarded as the harmful event in this case.[40] RDS submitted it did not take any damaging action in the form of CO_2 emissions, and that therefore the harmful event cannot be located in the Netherlands. RDS stated that the place of the harmful event was the place where the CO_2 emissions actually took place. According to RDS, the CO_2 emissions of the Shell group entities or the Shell end-users cannot be attributed to RDS. However, since Milieudefensie took the position that RDS is responsible for these CO_2 emissions, this also means that, since RDS products are used worldwide, the location of the damage-causing event is located in all countries worldwide and that therefore the law of all these countries applies.[41]

Besides that, the CJEU ruled in *ÖFAB/Koot* that, in the case of a tort in relation to a parent company that fails to comply with a statutory audit obligation, the place of the harmful event is the place of the activities of the daughter entities that the parent failed to manage.[42] According to RDS, this must lead to the determination of the applicable law being based on the places where the CO_2-emitting activities actually take place, thus leading to the applicability of the law of all countries where Shell companies are established.[43]

RDS concluded that Milieudefensie had argued on incorrect grounds that only Dutch law applied to its claim, and that the application of the Rome II Regulation leads to the applicability of the law of many different countries. RDS stated that this meant that Milieudefensie's claims could only be allowed if RDS' actions qualify as unlawful on the basis of *each* of the applicable legal systems.[44]

4. The assessment of the Court

In the *Shell* judgment, the Court first determined that the CJEU has not (yet) given any declaration on the 'event giving rise to the damage' in the sense of Article 7 Rome II Regulation.[45] The Court saw an insufficient basis in the interpretation of this provision to seek a link with the CJEU rulings, as cited by the parties, on other principles of liability. Some of these Rome II subjects refer to specific choice-of-law rules (intellectual property rights, unlawful competition, and product liability and prospectus liability).[46] The Court equally did not see a link with the case law cited by RDS, in which it was determined that a purely internal decision cannot be

38 CJEU 22 January 2015, ECLI:EU:C:2015:28 (*Pez Hejduk*); Statement of defense RDS, para. 307.

39 Supreme Court of the Netherlands 21 September 2001, ECLI:NL:HR:2001:ZC3483 (*BUS/Chemconserve*).

40 Statement of defence RDS, paras. 308-309.

41 Statement of defence RDS, paras. 310-311.

42 CJEU 18 July 2013, ECLI:EU:C:2013:490 (*ÖFAB/Koot*), see Statement of defence RDS, paras. 317-321.

43 Statement of defence RDS, para. 322.

44 Statement of defence RDS, paras. 340-342.

45 District Court of The Hague 26 May 2021, ECLI:NL:RBDHA:2021:5339, para. 4.3.4.

46 District Court of The Hague 26 May 2021, ECLI:NL:RBDHA:2021:5339, para. 4.3.4.

designated as an injurious event (the *BUS/Chemconserve* case), because the group policy of RDS cannot be equated with such internal decision making.

The Court dismissed any parallel with the law applicable to a participant in an unlawfully committed act perpetrated in concert (product liability). In the view of the Court, such a basis would not fit the characteristics of responsibility as regards environmental damage and imminent environmental damage.[47] These characteristics include that every emission of CO_2 and other greenhouse gases, anywhere in the world and caused in whatever manner, contributes to the damage and its increase, and that these CO_2 emissions only cause environmental damage and imminent environmental damage in conjunction with other emissions of CO_2 and other greenhouse gases for Dutch residents and the inhabitants of the Wadden region. Not only are CO_2 emitters held personally responsible for environmental damage in legal proceedings conducted all over the world, but also other parties that could influence CO_2 emissions. The underlying thought is that every contribution towards a reduction of CO_2 emissions may be of importance.[48]

The claims by Milieudefensie were directed at RDS as the policy-determining entity in Shell. After all, for the more than 1,100 companies established in other countries, it applies that their general policy is determined from the Netherlands.[49] According to the Court, the determination of Shell's group policy can be regarded as an 'independent cause of damage' which, in combination with the protective idea underlying Article 7 Rome II Regulation, justifies the choice for Dutch law by Milieudefensie.

As an *obiter dictum*, the Court considered that the conditional choice of law by Milieudefensie was in line with the concept of protection underlying Article 7 Rome II, and that the general rule of Article 4 paragraph 1 Rome II, upheld in Article 7 Rome II, insofar as the class actions seek to protect the interests of Dutch residents, also leads to the applicability of Dutch law.[50] The Court did not agree with RDS' argument that the mosaic principle should apply, since it only ruled regarding the damage that occurred in the Netherlands and not regarding damage that occurred elsewhere.[51]

5. Legal framework

The Court applied Dutch law to the claims by Milieudefensie et al. based on Article 7 and Article 4(1) Rome II Regulation.[52] Article 4(1) Rome II Regulation determines the main rule, i.e. unless otherwise provided for in the Regulation, the law applicable to a non-contractual

47 District Court of The Hague 26 May 2021, ECLI:NL:RBDHA:2021:5339, para. 4.3.4.

48 District Court of The Hague 26 May 2021, ECLI:NL:RBDHA:2021:5339, para. 4.3.5.

49 District Court of The Hague 26 May 2021, ECLI:NL:RBDHA:2021:5339, para. 4.3.6.

50 District Court of The Hague 26 May 2021, ECLI:NL:RBDHA:2021:5339, para. 4.3.7.

51 District Court of The Hague 26 May 2021, ECLI:NL:RBDHA:2021:5339, para. 4.3.5.

52 District Court of The Hague 26 May 2021, ECLI:NL:RBDHA:2021:5339, para. 4.3.2. Note that if the event(s) giving rise to the damage occurred after 11 January 2009, the Dutch courts will determine the applicable law based on the Rome II Regulation. If the event(s) that gave rise to the damage occurred before this date, the applicable law has to be determined based on the Unlawful Act (Conflict of Laws) Act [*Wet conflictenrecht onrechtmatige daad*] or, if the event(s) happened prior to 1 June 2001, the Dutch Supreme Court's case law. Furthermore, if the non-contractual obligation does not fall within the scope of the Rome

obligation arising out of a tort shall be the law of the country in which the damage occurs (the *Erfolgsort*) irrespective of the country in which the event giving rise to the damage occurred or the country or countries in which the indirect consequences of that event occur. The first exception to this rule entails that if both the person claimed to be liable and the person sustaining damage have their habitual residence in the same country at the time when the damage occurs, the law of the country shall apply.[53] The second exception to this rule stipulates that when it is clear from all the circumstances of the case that the tort is manifestly more closely connected with a country other than that indicated in paragraph 1, the law of that other country shall apply.[54] The Rome II Regulation is also applicable to non-contractual obligations that are likely to arise.[55] Furthermore, 'events giving rise to the damage' and the damage itself also include hypothetical scenarios, i.e. events that are likely to happen or damage that is likely to occur.[56] For cases in which several events of damage are spread across more than one country, for example, in cases of environmental damage, the mosaic principle applies, entailing that each damage is judged according to the law of the country where it was suffered.[57]

Article 7 Rome II Regulation provides for a special regime for international environmental damage. It determines that the *Erforlgsort* applies, but it also gives the injured party the possibility to base his claim on the law of the *Handlungsort*. The fact that the person sustaining the damage has a possibility to choose is referred to as the principle of favouritism. The European legislator has presented three reasons as to why the special regime of Article 7 Rome II Regulation is justified. First, the European legislator stresses the importance of the environment as confirmed by Article 174 of the Treaty establishing the European Community (*OJ* 2002, C 325),[58] which has also been laid down in Recital 25 of the Rome II Regulation.[59] Secondly, the European legislator refers to the importance of preventing environmental damage. Prevention is most effective if the strictest environmental liability regime is applicable, which also justifies the principle of favouritism. Lastly, the European legislator cites the principle that the 'polluter pays'. By adapting this special regime in Article 7 Rome II Regulation, the European legislator has thus explicitly prioritized protection against environmental damage.[60]

The term 'environmental damage' as referred to in Article 7 Rome II Regulation means an adverse change in a natural resource such as water, land or air, or an impairment of a function

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II Regulation, Art. 10:159 of the Dutch Civil Code (DCC) determines that the provisions of the Rome II Regulation shall apply *mutatis mutandis*.

53 Art. 4(2) Rome II Regulation.

54 Art. 4(3) Rome II Regulation.

55 Art. 2(2) Rome II Regulation.

56 Art. 2(3)(a) and 2(3)(b) Rome II Regulation.

57 Von Hein, in: G.-P. Calliess & M. Moritz (eds.), *Rome Regulations, Commentary*, 3rd edn., Alphen aan den Rijn: Wolters Kluwer 2020, Article 4 Rome II, margin no. 15 (p. 541). With reference to i.a. G. van Calster, *European Private International Law*, 2nd edn., Oxford and Portland, Oregon: Hart Publishing 2016, p. 164.

58 T.K. Graziano, 'The Law Applicable to Cross-Border Damage to the Environment: a Commentary on Article 7 of the Rome II Regulation', in: P. Sarçevic, *Yearbook of Private International Law*, Munich: European Law Publishers GmbH 2008, p. 75.

59 M. Bogdan, 'The Treatment of Environmental Damage in Regulation Rome II', in: J. Ahern & W. Binchy, *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations*, Leiden: Martinus Nijhoff Publishers 2009, p. 220.

60 Graziano 2008, p. 75 (*supra* note 58).

performed by a natural resource for the benefit of another natural resource or the public, as well as an impairment of the diversity of living organisms.[61] This covers both the damage to the environment itself, provided that it is the result of human activity, as well as damage sustained by persons or property as a result of such damage.[62] Multiple authors have argued that if the environmental damage is spread across more than one state and if the injured party chooses the *Erforlgsort*, it follows from the reference to Article 4(1) Rome II Regulation that the mosaic principle applies as well.[63] In order to achieve the application of a single law to multiple events of damage, the injured party may opt for the place where the event giving rise to the damage occurred. An opposing opinion is given by Munari and Schiano di Pepe, stating that applying the mosaic principle would lead to an unequal treatment of claimants.[64] Most authors do not discuss the interpretation of the term *Handlungsort* in depth and in particular omit to address the question whether the adoption of policy in a multinational corporation can be qualified as such. Junker does mention that the place of mere preparatory acts and the place at which an emission decision was made can be disregarded as the *Handlungsort*, but does not elaborate on what an 'emission decision' might entail.[65]

Article 7 Rome II Regulation speaks of the 'person seeking compensation for damage'. This might give the impression that determining the applicable law based on this article is not an option for a party that is seeking an injunction intended to prevent environmental damage. However, such a restrictive interpretation of Article 7 Rome II Regulation would be contrary to the aforementioned protective intentions of the European legislator, as also expressed in Recital 25 of the Rome II Regulation,[66] the underlying intention of Article 7 Rome II Regulation and also to the spirit of Article 2 Rome II Regulation. Article 7 Rome II Regulation should therefore be understood to also govern injunctions.[67]

6. Analysis of the assessment by the District Court of The Hague in the *Shell* judgment

As seen in the legal discussion that arose between the parties, the main point of discussion was whether the adoption of the policy concerned by RDS could qualify as the '*Handlungsort*' as meant in Article 7 Rome II Regulation. The Court followed Milieudefensie in its considerations, thereby heavily relying on the protection objective of Article 7 Rome II Regulation. In doing so, the Court dismissed all the arguments that RDS presented. However, the Court did not provide a reasoned decision as to why it saw insufficient grounds to apply the cited case law

61 Rome II Regulation, Preamble, no. 24.

62 Von Hein 2020, Article 7 Rome II, margin no. 6 (*supra* note 57) (p. 658).

63 Von Hein 2020, Article 7 Rome II, margin no. 17 (p. 661), see also: F. Ibili, *GS Onrechtmatige daad*, art. 4 Rome II, aant. 1.

64 F. Munari & L. Schiano di Pepe, 'Liability for Environmental Torts in Europe: Choice of Forum, Choice of Law and the Case for Pursuing Effective Legal Uniformity', in: A. Malatesta (red.), *The Unification of Choice of Law Rules on Torts and Other Non-Contractual Obligations in Europe: the 'Rome II' Proposal*, Padova: CEDAM, 2006.

65 MüKoBGb/Junker, 8th edn. 2021, Rome II-VO Art. 7, marginal number 22. Translation of: '*der Ort bloßer Vorbereitungshandlungen bleibt ebenso außer Betracht wie der Ort, an dem über eine Emission entschieden wurde*.'

66 Bogdan 2009, p. 221 (*supra* note 59).

67 *Idem*.

by analogy. The Court equally did not provide a reasoned decision as to why it found that the policy of RDS could not be equated with a purely internal decision, nor did the Court explain why it found that the interpretation of the *Handlungsort* by the CJEU in *ÖFAB/Koot* had to be disregarded. We imagine that it would have been logical for the Court to provide a more extensive substantive explanation as to why it rejected this case law.

In addition, due to a lack of legal precedent regarding Article 7 Rome II Regulation, both Milieudefensie and RDS relied on the analogous application of case law that concerned the interpretation of the *Handlungsort* under the Brussels I*bis* Regulation. As described above, the CJEU, in principle, allows such an analogous interpretation. By dismissing all the cases that RDS presented without a sufficient explanation, the Court did not follow this line of interpretation. We believe that, given the worldwide implications of the judgment and the fact that there is no legal precedent from the CJEU or the Supreme Court, the Court *ex officio* should have requested a preliminary ruling from the CJEU regarding the interpretation and the scope of the *Handlungsort*. We can only speculate over the reason why neither Milieudefensie nor RDS asked for a preliminary ruling on this subject themselves.

On balance, we feel that the outcome of the *Shell* judgment in relation to the applicable law is in itself defendable. The EU legislator has established a special regime for environmental damage based on the favouritism principle in the first place to protect the environment. The *Shell* judgment is in keeping with that objective. In this day and age, the world is facing a climate change problem that needs immediate action. Had the Court followed RDS' arguments, it could not have contributed to solving these climate issues. As RDS has already announced that it intends to appeal against the *Shell* judgment, it will only be a matter of time before we discover whether the considerations of the Court will be upheld.